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Supreme Court of the United States

TERM — 1981

ROBERT A. JACOBS AND MIDLAND INSURANCE COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BY COUNSEL OF RECORD:

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A. QUESTIONS PRESENTED

I. Whether a proceeding on the Government's motion for forfeiture of a bail bond against a bondsman and surety is a civil or criminal proceeding.

II. Whether, in a forfeiture proceeding the bondsman and surety may be denied all discovery rights otherwise available to other parties under Rule 26 (b) (1) of the Federal Rules of Civil Procedure.

III. Whether, in a bond forfeiture proceeding, the bondsman and surety may be denied all discovery simply because the district court concluded from its *in camera* examination of certain materials submitted by the Government that those materials were hearsay in nature.

IV. Whether, in a bond forfeiture proceeding, the "informer's privilege" may act as a complete bar to all discovery by a bondsman and surety of information relevant to their defense of the action, where prior to the scheduled appearance of the criminal defendant (the principal on the bond): 1) the Government learned of a plan to kill the principal and offered him federal protection, and 2) the principal, in fact, disappeared under circumstances indicating that he had been killed by underworld figures; and subsequent to the required court appearance, the Government conducted an extensive grand jury investigation which developed information from many sources, not all of whom were informants, that the informant had been killed.

V. Whether, in a bond forfeiture proceeding, the informer's privilege" is invoked by the bare refusal of the Government to disclose information in its files where it never expressly claimed the "informer's privilege" or represented that revelation of an informant's identity would place that person in jeopardy, would result in that person's being unavailable in the future as a Government informant, or would interfere with any on-going investigation.

VI. Whether the "informer's privilege" is entitled to greater weight in a civil proceeding than in a criminal proceeding.

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C. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the United States Court of Appeals for the Second Circuit is not reported but appears in the Appendix hereto. (App. 1) The memorandum of opinion (styled as an order) by the United States District Court for the District of Connecticut and the endorsement of that court on the Government's Motion for Forfeiture of Bond have not been reported but appear in the Appendix hereto. (App. 4, 9)

D. STATEMENT OF THE GROUNDS FOR JURISDICTION

1. The date of the judgment sought to be reviewed is November 10, 1980.

2. A petition for rehearing or, alternatively, rehearing *en banc,* was denied on February 5, 1981.

3. No cross-petition for writ of certiorari has yet been filed by the United States, the respondent herein.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

E. STATUTORY PROVISIONS

Rule 26(b) (1) of the Federal Rules of Civil Procedure provides:

> (b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge

of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 46(e) of the Federal Rules of Criminal Procedure provides:

(e) FORFEITURE.

(1) DECLARATION. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) SETTING ASIDE. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) ENFORCEMENT. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) REMISSION. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph 2 of this subdivision.

F. THE BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The motion of the United States for Forfeiture of Bond was filed in the United States District Court for the District of Connecticut pursuant to Rule 46 of the Federal Rules of Criminal Procedure.

G. STATEMENT OF THE CASE

This is a Petition for Certiorari by the bondsman and corporate surety from a decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the District of Connecticut granting the motion of the United States for forfeiture of bond in *United States of America* v. *Salvatore Anthony Annunziato*. The affirmance by the appellate court was "substantially for the reasons" stated by the district court in its opinion dated April 14, 1980 (App. 3) and in its endorsement on an order dated June 16, 1980.[1] (App. 3) The principal on the bond, Salvatore Anthony Annunziato, did not appear in court for a calendar call on July 9, 1979. The petitioners opposed the motion on the grounds of impossibility of performance: It was impossible for Annunziato to appear in court because he was killed by underworld figures prior to the date of the scheduled court appearance.[2] The bondsman and surety were prevented from fully presenting this defense because the district court, on April 14, 1980 and May 30, 1980, denied *in toto* all their motions for discovery.

The bail forfeiture proceedings stemmed from a criminal indictment that was handed down against Salvatore Anthony Annunziato in the United States District Court for the District of Connecticut on April 26, 1979. Annunziato was charged with two counts of aiding and abetting theft of union funds in violation of Title 29, United States Code, § 501(c) and one count of conspiracy to steal union funds in violation of Title 18, United States Code, § 371. The maximum penalty on each count was five years imprisonment and/or a fine of $10,000.00.

Subsequent to indictment, Annunziato was released on a corporate surety bond in the amount of $30,000.00 on April

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[1] Although the Second Circuit refers to the district court's endorsement on an order dated June 16, 1980, it seems clear that it was referring to the district court's June 16 endorsement on the Government's Motion for Forfeiture of Bond.

[2] Impossibility of performance has long been recognized by this Court as a defense to bail forfeiture. *Taylor* v. *Taintor*, 83 U.S. (16 Wall) 366 (1873).

27, 1979. That bond was posted by Robert A. Jacobs and the Midland Insurance Company, the petitioners herein.

The evidence presented in the district court revealed that an FBI informant who had given information in the past told the FBI that there was a "contract" out on Annunziato's life and that he was about to be killed. That information was conveyed to Government attorney Donald Abrams, the Organized Crime & Racketeering Section prosecutor who was handling Annunziato's criminal case. In early June, Abrams telephoned counsel for Annunziato, informed him of the existence of the "contract", stated that the Government believed this to be a viable threat on Annunziato's life, and asked counsel to convey that information to Annunziato and to offer the protective services of the federal government. (Tr. May 30, 1980 [hereinafter referred to as Tr. III], pp. 39-42) Counsel shortly thereafter met with Annunziato and informed him of the "contract" and the Government's offer of protection. Annunziato declined that offer. (Tr. III, p. 41) On June 19, 1979, under highly suspicious circumstances which indicated that the contract had been executed, Annunziato disappeared from home. He was never heard from again. (Tr. III, pp. 6-7) His family later filed a missing persons report with the local police who, in turn, contacted the Federal Bureau of Investigation.

The FBI began an extensive investigation into Annunziato's disappearance, eventually interviewing a total of some eighty persons in states as far away as Florida, California, North Carolina and Missouri. These interviews were a part of an extensive and far-reaching grand jury investigation into the Annunziato disappearance.

Annunziato had an extensive criminal record, but had never previously failed to appear at court when required. He was well known to both federal and local law enforcement authorities in the state of Connecticut. His convictions stretched back to the early 1940's with arrests and convictions for crimes ranging from illegal purchase of gasoline tax stamps to armed robbery and aggravated assault and conspiracy. (Tr. III) At all times in the past, even when he had been convicted and

faced substantial prison sentences, he had appeared at court when required.

On July 2, 1979, after the mysterious disappearance, the Government filed a Motion for Calendar Call in which it represented that counsel for Annunziato had informed the Government that Annunziato had been missing since June 19, 1979; that a formal "missing persons report" had been filed with authorities on June 27, 1979; that since that date law enforcement personnel had attempted without success to locate Annunziato's whereabouts; and, that, in the Government's opinion, Annunziato was "unable or unwilling to keep his court commitments". (App. 11-12)

A calendar call was held on July 9, 1979. Annunziato did not appear. The Government presented the testimony of two witnesses — the bondsman, Robert Jacobs, and FBI Special Agent David Cotton. Jacobs testified that he last saw Annunziato on or about June 19, at which time he made arrangements to meet with Annunziato the following Saturday, June 23. He telephoned to confirm that meeting but no one knew where Annunziato was. Jacobs also had made substantial efforts to locate Annunziato in order to assure his appearance in the district court in response to the calendar call. Jacobs could not locate Annunziato, but said it was the general consensus that if Annunziato could be in court he would be. Jacobs had posted bond for Annunziato on numerous prior occasions, and Annunziato had always appeared in court when required. Jacobs learned through law enforcement personnel that harm was going to come to Annunziato and local law enforcement people had informed Jacobs that it was their opinion that harm had befallen him. It was Jacobs' opinion that Annunziato could not exist outside of New Haven. (Tr. July 9, 1979 [hereinafter referred to as Tr. I], p. 7)

Special Agent Cotton testified that the FBI had received information that a "contract" had been out on Annunziato's life prior to his disappearance. He further testified that that information was conveyed to Annunziato by his attorney and that many of his friends and acquaintances believed that he had been the victim of foul play. (Tr. I, pp. 8-11) Cotton had

been informed by the East Haven Police Department on June 27, 1979 that a missing persons report had been filed by Annunziato's family on that date. The report indicated that he had disappeared from his home on June 19, 1979. Based on interviews conducted by FBI agents of Annunziato's family, it was learned that Annunziato had received a telephone call at approximately 8:00 p.m. on the evening of June 19 and shortly thereafter left his home in response to a car horn. He had not been seen nor heard from since that date. The FBI interviewed friends and family members and also asked for assistance in the investigation from other FBI field offices. (Tr. I, p. 9)

At the conclusion of the hearing, the court issued a bench warrant in compliance with the Government's request and set bond in the amount of $250,000.00. The Government did not request forfeiture of bail. (Tr. I, pp. 12-13)

Some nine months later, on March 13, 1980, the Government filed a Motion for Forfeiture of Bond. In its motion, the Government stated that the United States Marshal Service had not executed the bench warrant issued in July of the preceding year; that a grand jury investigation was instituted into the disappearance of Annunziato; and that the investigation had concluded. (App. 13-15) In its memorandum in support of the motion, the Government indicated that the grand jury investigation into the disappearance of Mr. Annunziato was conducted between June, 1979 and January, 1980, and that approximately 80 persons had been interviewed by the FBI in connection with that investigation.[3] (App. 33) The Government inexplicably omitted any mention of the information it had received about the planned execution of Annunziato.

The bondsman and corporate surety filed a number of pleadings to assist them in marshalling evidence to show that Annunziato had been executed prior to the date of his required court appearance: Requests for Admissions (App. 16); Interrogatories (App. 19); Request for Production (App. 28); and a Request for an Extension of Time Within Which to File a

[3] The grand jury did not return an indictment against Annunziato for bail jumping. 18 U.S.C. § 3150.

Responsive Memorandum and for An Evidentiary Hearing on the Motion for Forfeiture. The Government objected to all of these pleadings, claiming that the discovery provisions of the Federal Rules of Civil Procedure were inapplicable to the bond forfeiture proceedings.

Oral argument was held and counsel for the bondsman and surety represented that all of the information then available to the bondsman and surety indicated that Annunziato had been killed prior to the date of the calendar call. Counsel represented that it was necessary to obtain discovery of certain facts known only to the Government by virtue of its investigation so that the bondsman and surety could gather evidence essential to presenting the defense of impossibility of performance. (Tr. April 1, 1980 [hereinafter referred to as Tr. II], pp. 22-23) The bondsman and surety contended that the information in the Government's files would either support the contention that Annunziato had been killed or serve as a foundation for further investigation which would establish the truth of that contention.

The Government vehemently opposed petitioners' discovery motions but agreed to submit "the grand jury materials *or* the FBI investigation" for in camera review by the district court. (Emphasis added) (Tr. II, p. 34) It should be noted that the Government did not represent that either or both of these items represented *all* of the information in its possession with respect to whether Annunziato was alive or dead. (Exactly what materials were submitted by the Government to the district court cannot be known; a close reading of the district court's memorandum[4] leads to the conclusion that only the F.B.I. files, and not the grand jury transcripts or other information contained in the United States Attorney's files were submitted to or examined by the district court. Those materials submitted

[4] "[t]he information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation. The sources of such information bring to bear what is known as the informer's privilege. . ." (App. 6)

were marked as Court Exhibit 1 and submitted under seal to the United States Court of Appeals for the Second Circuit. The Clerk of the Second Circuit has been requested to certify and forward, under seal, this part of the record to this Court.)

In a memorandum opinion dated April 14, 1980, the district court denied *in toto* petitioners' Request for Admissions, Interrogatories, and Request for Production (App. 4-8), concluding that the information requested by the petitioners would necessarily lead to a revelation of the identity of informant sources. The district court noted:

> This Court has reviewed all of the documents delivered to it by the Federal Bureau of Investigation (F.B.I.) and finds no information contained therein which *establishes* that Mr. Annunziato was dead on or before July 9, 1979. The information relative to claims that Mr. Annunziato is dead can at best be characterized as speculative uncorrobated multiple hearsay which is also contradictory in nature. (App. 5-6) (Emphasis added)

The district court then balanced the parties' competing interests in the bondsman's and surety's discovery requests:

> Mr. Jacobs' potential liability in this proceeding is the loss of thirty thousand dollars ($30,000.00). Balancing Mr. Jacobs' potential loss against compelling the Government to disclose equivocal information which is likely to lead to the identity of the source leads this Court to conclude that the privilege exception to Rule 26(b) (1) Fed. R. Civ. P. is applicable to this case and the limitations on invoking that privilege as stated in Roviaro inapplicable.

Petitioners filed a Motion for Reconsideration of the Denial of Request for Identity of the Informant with supporting memorandum, which motion was denied. (App. 34)

A hearing on the Government's Motion for Forfeiture of Bond was held on May 30, 1980. The bondsman and surety called five witnesses. Mrs. Annunziato, the principal's wife, testified that she and her husband had been married since 1942 and that, with the exception of those times when Annunziato

was incarcerated, he never had been away from home for any substantial period of time. On those occasions when he had been away, he always had maintained contact with his family. She described how her husband left home on June 19, 1979 stating that after arriving at his home in East Haven, he received a telephone call and told her he would have to go out for a while. Shortly thereafter she heard a car horn outside the home and Annunziato left. After a number of days when neither she nor any other members of the family had heard from Annunziato, they became concerned about his well-being. They discussed this concern with his attorney and thereafter called the East Haven Police and filed a missing persons report on June 27, 1979. Although Annunziato had provided for his family's financial well-being while he was away on previous occasions, this did not occur on this occasion.[5] In the eleven months following June 19, 1980, Mrs. Annunziato had neither seen nor heard from her husband. (Tr. III, p. 7)

Donald Abrams had been an attorney with the Organized Crime and Racketeering Section of the United States Department of Justice prosecuting Annunziato's case at the time of his suspicious disappearance. Abrams testified that the FBI had informed him that one of its sources stated that there was a "contract" out on Annunziato's life prior to Annunziato's disappearance. Abrams was sufficiently concerned about the viability of that threat that he conveyed its existence to one of Annunziato's lawyers and offered federal protection to Annunziato. (Tr. III, pp. 14-15)

Wayne Sadick, Deputy Clerk of the Superior Court for the Judicial District of New Haven, produced documents concerning Mr. Annunziato's prior exemplary record for appearance in state court, the latest of which involved a 1971 case.

In fact, the Government stipulated that "Mr. Annunziato has numerous arrests, has a terrible record and has never failed to appear before the instance under dispute." (Tr. III, p. 28)

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[5] There is one sole exception. Approximately a week after Mr. Annunziato was missing, a friend came by and left $250.00 in cash at the home. (Tr. III, p. 11)

William Dow, one of Annunziato's attorneys, testified that Abrams contacted him in early June of 1979, advised him of a legitimate threat on Annunziato's life, and offered Annunziato federal protection. Dow advised Annunziato of this threat but Annunziato declined protection. (Tr. III, pp. 41-42)

Nicholas Pastore, the Director of Operations of the New Haven Police Department, testified that it was his opinion that "Mr. Annunziato met his demise at the hands of the underworld" on or before June 27, 1979, almost two weeks before the July 9 calendar call. Pastore had been acquainted with Annunziato for approximately fifteen years and was intimately connected with the lengthy investigation into his disappearance. Based on that investigation, Pastore testified that after Annunziato received a telephone call in the evening of June 19, 1979, he went to Bridgeport with some "former friends" and had some contact with an individual by the name of Thomas Vastano, also known as "Tommy the Blonde". In fact, Vastano had met a violent end some time subsequent to Annunziato's disappearance.

Director Pastore also testified that Caesar Canestri was an individual who had given Pastore reliable information on many occasions in the past. The petitioners introduced a transcript of a tape recorded conversation between Pastore and Canestri which took place on September 23, 1979. (Tr. III, p. 32) The transcript included statements by Mr. Canestri to Pastore in which Canestri stated that Annunziato was dead. (Defendant's Exhibit 503)

The Government called three witnesses. Special FBI Agent Edward Adams testified that on two occasions, prior to the September 3, 1979 conversation between Caesar Canestri and Nicholas Pastore introduced by the surety, he interviewed Canestri. During these conversations, Canestri opined to Adams that although he had no knowledge of the whereabouts of Annunziato, Annunziato might have gone to a warm climate with a girlfriend, and that he had heard a rumor that Annunziato might be in Italy. (Tr. III, p. 44)

Also testifying at the hearing were employees of the Bran-

ford Motor Inn, a motel in the New Haven area which Mr. Annunziato frequented. The general manager of the motel testified that on June 18, 1979 Annunziato engaged a room for two nights which he paid for in advance with cash. Since Annunziato had paid cash in advance there was no check-out information available. (Tr. III, pp. 47-53) A security officer, Stanton, who was familiar with Annunziato, testified that on June 18 he saw Annunziato check into the motel at about 6 o'clock in the evening. On the following night, June 19—the night of Annunziato's disappearance—Stanton testified that he saw neither Annunziato nor his car in the area of the motel. (Tr. III, pp. 56-60) At the conclusion of the hearing, petitioners renewed their motion seeking the identity of the informer, but the court again denied the motion. (Tr. III, p. 74)

On June 16, 1980, the court placed an endorsement on the Government's Motion for Forfeiture of Bond as follows:

> Viewing the evidence with a circumspective eye, this Court finds the testimony presented by the bondsman as circumstantial evidence of the defendant's death, prior to July 9, 1979, seriously lacks the confidence, or sufficiency required to excuse a criminal defendant's failure to appear. The government's motion for forfeiture of bond pursuant to Rule 46(e) Fed. R. Crim. P. is GRANTED, substantially for the reasons set forth in its brief filed June 11, 1980. (App. 9)

The bondsman and surety appealed to the Second Circuit, which in a decision rendered on November 10, 1980, upheld the district court's denial of petitioners' discovery requests and affirmed the judgment of the district court granting the Government's motion to forfeit the bond of $30,000.00 "substantially for the reasons set forth in Judge Daly's opinion dated April 14, 1980 and his endorsement on the June 16, 1980 order [*sic*]."[6] (App. 3)

The petition by the bondsman and surety for rehearing and/or rehearing *en banc* was denied by the United States

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[6] See footnote 1, supra.

Court of Appeals for the Second Circuit on February 5, 1980. (App. 10)

I. REASONS FOR GRANTING THE WRIT

1. *The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Whether a Motion to Forfeit Bail Bond Is a Civil or Criminal Procedure.*

The Second Circuit treated the bond forfeiture proceeding in this case as a civil matter to which the Federal Rules of Civil Procedure apply. In its decision, the Second Circuit quoted from the memorandum of the district court dated April 14, 1980 in which the district court stated that it was led "to conclude that the privilege exception to Rule 26(b) (1) of the Fed. R. Civ. P. is applicable to this case" and went on to affirm the judgment of the district court. Thus, the Second Circuit concluded that a hearing on forfeiture of a bail bond is a civil proceeding.

The Tenth Circuit has taken the opposite position. In *United States* v. *Jones,* 567 F.2d 965 (10th Cir. 1977), that court held that an appeal by a surety from a judgment on forfeiture of bail bond is controlled by the Federal Rules of Criminal Procedure. In its decision in *Jones,* the Tenth Circuit noted that its position was in conflict with at least two other circuits. *Id.* at 967.

The Second Circuit followed the lead of the Fifth, Ninth and Third Circuits in treating bail bond forfeiture proceedings as governed by the Federal Rules of Civil Procedure. *United States* v. *Zarafonitis,* 150 F. 97 (5th Cir. 1907); *United States* v. *Barger,* 458 F.2d 396 (9th Cir. 1972); *United States* v. *Plechner,* 577 F.2d 596 (9th Cir. 1978); *United States* v. *Martinez,* 613 F.2d 473, 482 n. 30 (3d Cir. 1980). The Sixth Circuit has also implicitly adopted this position. *United States* v. *D'Anna,* 487 F.2d 899 (6th Cir. 1973). In *Plechner,* the Ninth Circuit expressly recognized that its position differed from that of the Tenth Circuit but stated, "[b]ased on precedent within our

own circuit and a reexamination of the relevant principles, we conclude that enforcement of a bond forfeiture is, like an action to collect a criminal fine, a civil case arising from a prior criminal proceeding." 577 F.2d at 597.

2. *The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Decided by This Court.*

A.

In the bond forfeiture proceeding below, the petitioners relied on the long-recognized defense of impossibility of performance. *Taylor* v. *Taintor,* 83 U.S. (16 Wall.) 366 (1873). By seeking discovery, they attempted to marshall evidence to support this defense by showing that Annunziato had been killed before the date of the calendar call. The district court's ruling completely denied them discovery and, thus, thwarted their efforts to prove their defense. Under the circumstances here, set forth in the Statement of Facts, this defense was far from a speculative "shot in the dark" defense.

The district court concluded that they were not entitled to the discovery sought because the "information relative to the claims that [he] is dead can best be characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature." (App. 5-6) However, under Rule 26 of the Federal Rules of Civil Procedure, which the courts below found applicable to the proceedings in this case, the fact that the information sought would be inadmissible at trial is not a bar to discovery if that information appears "reasonably calculated to lead to the discovery of admissible evidence." By denying discovery because of the character of the information available, the lower courts denied to petitioners that discovery to which a party in a civil proceeding is entitled under Rule 26 of the Federal Rules of Civil Procedure.

This Court should decide the extent to which Rule 26 of the Federal Rules of Civil Procedure is applicable to bond forfeiture proceedings.

B.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that parties may obtain discovery "regarding any matter not privileged." Precisely what, if anything, the Government must do to invoke the "informer's privilege" has not previously been decided by this Court. Also not previously decided, but raised by the instant case, is whether the trial court, *sua sponte,* may invoke the privilege on behalf of the Government where the Government, itself, has failed to squarely raise the issue.

Where the Government chooses to invoke the privilege of "military secrets", it has been required by this Court to assert a "formal claim of privilege" lodged by the head of the department that has control over the matter, after actual, personal consideration by that officer. *United States* v. *Reynolds,* 345 U.S. 1 (1953). In contrast, many courts have permitted invocation of the "informer's privilege" on the bare assertion that the informant status exists, and that the prosecution is unwilling to disclose the name. See *Melendez* v. *Superintendent, Clinton Correctional Facility,* 399 F.Supp. 430, 438 (E.D.N.Y. 1975). Given the frequency with which the "informer's privilege" is raised, and the number of cases affected, it would be most useful for this Court to set guidelines for its assertion.

The Second Circuit, by adopting the reasoning of the district court, here permitted the invocation of the "informer's privilege" with no express claim thereto by the Government.[7] The nearest approximation to such a claim was the Government's representation during the April 1, 1980 hearing that:

> The government's investigation into the disappearance of Mr. Annunziato involved both FBI interviews and a grand jury investigation, which I might represent to the Court went parallel and along with an additional criminal in-

[7] The defendants had requested in their interrogatories that the Government: Please identify by name and address all individuals who have provided to the United States of America, or to any of its agents, attorneys, representatives, or others acting on its behalf, or to any state or local law enforcement personnel, any information to the effect that, or expressed the belief that, Salvatore Anthony Annunziato is presently deceased. (App. 19)

> vestigation by the grand jury into possible federal violations by Mr. Annunziato and others. It was not a separate, entirely separate and distinct investigation in that sense, but that it was coupled with another, ongoing criminal investigation which also involved Mr. Annunziato's actions prior to his disappearance.

After an *in camera* review of an undetermined amount of the Government's file, the district court concluded on its own that "[t]he information contained in the F.B.I. files relative to the whereabouts of Mr. Annunziato, specifically the speculation that he is deceased, was obtained by the F.B.I. from informant sources developed during the course of a criminal investigation. The sources of such information bring to bear what is known as the informer's privilege . . ." (App. 6) It is especially noteworthy that the Government *never* claimed that all its information was gathered from informant sources. Nonetheless, the Second Circuit affirmed the denial of discovery substantially for the reasons set forth by the district court in its memorandum. (App. 3)

It would be useful for this Court to clarify what the Government must assert as a condition to triggering implications of the "informer's privilege". Is it enough to merely assert that the informer status exists; or, must the Government assert that disclosure of the informant's identity would jeopardize an ongoing investigation, the personal safety of the individual involved, or the utility of this individual in criminal investigations?

This clarification is essential for guidance to lower courts which must apply the test ennunciated in *Roviaro* v. *United States,* 353 U.S. 53 (1957)

> A limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. *Id.* at 60-61

This is essentially a balancing test—"balancing the public interest in protecting the flow of information against the individual's right to prepare his defense". *Id.* at 62. If nothing more is required than the assertion of informant status or the unwillingness of the Government to disclose information contained in its files, the lower courts are left without guidance by this Court as to how the balancing test should be applied.[8] Are all alleged informants to be conclusively deemed equally valuable, and accorded the same weight on the scale balancing the need for their protection against the defendant's right to prepare his defense? This would appear to conflict with the *Roviaro* directive that the determination regarding disclosure be based on the facts presented in each case.

The absence of guidance, predictably, has resulted in a lack of uniformity in the lower courts. *Compare, Westinghouse Electric Corp.* v. *City of Burlington,* 351 F.2d 762, 768 & n.10 (D.C. Cir. 1965) (the privilege is not to protect the particular informant but to protect the flow of information to the government; the privilege is maintained to encourage possible informers in the future) *with United States* v. *Fernandez,* 506 F.2d 1200, 1204 (2d Cir. 1974) ("there is before us no convincing showing of substantial danger, and since these individuals do not provide a continuing source of information to the government, there is little occasion . . . to consider a *Roviaro* balance"); and *United States* v. *Gibbs,* 435 F.2d 621, 624 (9th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971) (court must weigh the usefulness of an informer and of protecting him personally.)

The need for guidance is highlighted by the facts in the instant case. The petitioners repeatedly sought the identity of the informer in order to be able to prepare a defense. Specifically, the bondsman and surety contended that disclosure of the identity of the person who had provided information about the "contract" on Annunziato's life was crucial because they

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[8] The problem becomes more complicated because the term "informant" has been ascribed differing meanings. *See United States* v. *Miller,* 499 F.2d 736, 741 (10th Cir. 1974); *Gordon* v. *United States,* 438 F.2d 858 (5th Cir.), *cert. denied,* 404 U.S. 828 (1971).

needed to consult with that individual both to ascertain the source of his information and to learn of further information concerning whether or not the alleged contract had been executed. (Tr. II) The government objected to any and all discovery, including that of the identity of the informant, while it simultaneously took the position that this confidential source was "unreliable."

An interrelated issue is the need for this Court to address whether a trial court may, *sua sponte,* invoke the "informer's privilege" as was done here. Other privileges, such as that against self-incrimination, must be *expressly* asserted. *See, e.g., Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 104 (1961). If it may, guidance is needed to direct the trial court on how to decide whether, in fact, information comes from an informant and, if so, whether the information would lead to the revelation of that individual's identity.

C.

The court below assumed that the bond forfeiture proceeding was civil in nature and adopted the position that because a defendant in a civil suit is subject to less severe sanctions in the event of an adverse judgment than a criminal defendant, a civil defendant should be required to make a greater showing of need to overcome the policies underlying maintenance of the "informer's privilege". No case law was cited for this proposition, but, rather, a commentator: 4 Moore's Federal Practice, ¶26.61 [6.-2], at 26-304 n.5 (2d ed. 1948). A few pages later, however, this same widely-cited commentator also points out that courts have taken the view that where the government is a party to an action not involving governmental regulatory functions, the presumption should be stronger that the private party should have the full benefit of the discovery procedure, and any claim of "governmental privilege" should be scrutinized with even greater skepticism. 4 Moore's Federal Practice, ¶26.61[7], at 26-323. *See also Bank Line, Ltd.* v. *United States,* 163 F.2d 133 (2d Cir. 1947).

The Government is frequently a plaintiff in a civil suit for damages; thus, the issue often arises whether the government is

entitled to a status superior to that of other private litigants with regard to matters otherwise privileged from disclosure; or whether, in fairness to the defendant, it, as other civil plaintiffs, may be required to waive the protection that the law will ordinarily afford to one who has not instituted a lawsuit. *See Henrik Mannerfrid, Inc.* v. *Teegarden,* 2 F.R. Serv. 2d 593, 596-97 (S.D.N.Y. 1959); *Brennan* v. *Automatic Toll Systems, Inc.,* 17 F.R. Serv. 2d 891, 892 (S.D.N.Y. 1973). Affording the Government a status superior to other civil plaintiffs regarding privileges, including the "informer's privilege," prohibits a "fair determination of [the] cause." *Roviaro, supra,* at 60-61.

The petitioners respectfully submit that this Court should resolve the question of whether the Government, where it is acting as a private plaintiff, is entitled to a greater protection than other private litigants with regard to discovery of otherwise privileged information. Private litigants by initiating a lawsuit, in fairness to defendants, are deemed to waive privileges,[9] to which they would otherwise be entitled, including privileges of constitutional dimension.

3. *The Court Below Has Decided a Federal Question in Confict with the Applicable Decisions of This Court.*

The district court denied all petitioners' requests for discovery for the blanket reason that the information sought was covered by the "informer's privilege."

This Court has stated that the "informer's privilege" is not absolute, and in *Roviaro* v. *United States,* 353 U.S. 53 (1957) noted:

> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.
>
> *Id.* at 56.

[9] The theory behind waiver is that the private plaintiff has the choice of either not instituting the suit or pursuing the suit and waiving the privilege.

The Second Circuit, by its affirmance, far extended the "informer's privilege" to include *all* investigatory materials and records compiled for law enforcement purposes, even where the information sought would not lead to the revelation of the informant's identity.[10]

The reason for this extension of the "informer's privilege" appears to stem from the district court's conclusion, after reviewing, *in camera,* certain materials submitted by the Government, that there was nothing that "establishes" that Annunziato was dead on or before July 9, 1979, and that the "information relative to claims that [he] is dead can be best characterized as speculative uncorroborated multiple hearsay which is also contradictory in nature." (App. 5-6) But, where, as here, nonprivileged information is sought, the *Roviaro* privilege is inapplicable.[11]

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[10] For example, the bondsman and surety requested in their interrogatories:

> 2(g) A full and complete summary of all. . .information [indicating that the life, health, or safety of Salvatore Anthony Annunziato was endangered]. (App. 19-20);
>
> 6(g) A full and complete summary of all. . .information [to the effect that Salvatore Anthony Annunziato was deceased]. (App. 20-21);
>
> 9(g) A full and complete summary of all. . .information [to the effect that Salvatore Anthony Annunziato is presently alive and in abscondance and unwilling to appear in court]. (App. 22);
>
> 29. Please state whether the United States of America has in its files any information to the effect that Salvatore Anthony Annunziato was connected in any way with individuals whom the United States of America considers to be members of "organized crime". (App. 26); and
>
> 34. Please state whether at any time from April 26, 1979 to the present, the United States of America received any information indicating that Mr. Annunziato had fallen into disfavor with individuals whom the United States of America believes to be members of organized crime. (App. 27)

[11] In their Petition for Rehearing and Petition for Rehearing En Banc, the bondsman and surety pointed out that the Second Circuit apparently overlooked the fact that much of the discovery sought did not involve the informant's privilege. The Petition for Rehearing was denied.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

The Plaintiffs

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Dated: March , 1981 By

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